United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF AND APPENDIX

76-6004

To be argued by
KENNETH R. DAVIS

United States Court of Appeals

FOR THE SECOND CIRCUIT

B

Docket No. 76-6004

P/S

NELLIE T. GOFF,

Appellant,

—v.—

CASPAR WEINBERGER, Secretary of Health, Education and Welfare, et al.,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

BRIEF AND APPENDIX FOR THE APPELLEE

PETER C. DORSEY
United States Attorney
District of Connecticut
New Haven, Connecticut 06508

KENNETH R. DAVIS
Assistant United States Attorney

TABLE OF CONTENTS

	PAGE
Statement of the Case	1
Statement of Facts	2
Statutes and Regulatory Provisions Involved	5
Questions Presented	19
ARGUMENT:	
A. The trial court did not err in holding that the oral inquiry concerning entitlement to Survivor's Insurance benefits made by Attorney Bernard Grabowski on behalf of Nellie T. Goff in 1959 did not constitute an intent to claim Survivor's Insurance benefits pursuant to the Social Security Act	20
B. The trial court did not err in holding that the requirement of a written statement of intent to claim Survivor's Insurance benefits pursuant to the Social Security Act had not been properly waived by the Hearing Examiner	27
CONCLUSION	33
APPENDIX:	
Memorandum of Decision, Judge Clarie, October 17, 1975	1a
Decision of Appeals Council	8a
Memorandum of Decision, Judge Clarie, July 1, 1974	18a
Plaintiff's Notice of Appeal from Judgment	25a

TABLE OF CASES

PAGE

Abel v. *Secretary of Health, Education and Welfare*, Civil No. 15,496 (D. Conn. July 1, 1974) 22

Alcoa Steamship Co., Inc. v. *Federal Maritime Commission*, 321 F.2d 756 (D.C. Cir. 1963) 28

Bender v. *Celebrezze*, 332 F.2d 113 (7th Cir. 1964) 22, 26

Celebrezze v. *Bolas*, 316 F.2d 498 (8th Cir. 1963) .. 20

Ewing v. *Black*, 172 F.2d 331 (6th Cir. 1949) 31

Federal Crop Insurance Corp. v. *Merrill*, 322 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 10 30

Fink v. *S.E.C.*, 417 F.2d 1058 (2d Cir. 1969) 28

Flamm v. *Ribicoff*, 203 F. Supp. 507 (S.D.N.Y. 1961) 22, 26, 30

Garrett v. *Richardson*, 363 F. Supp. 83 (D. S.C. 1973) 29

Hennig v. *Gardner*, 276 F. Supp. 622 (N.D. Tex. 1967) 29

James v. *United States*, 185 F.2d 115, 22 A.L.R. 2d 380 (4th Cir. 1950) 30

Labee v. *Cohen*, 408 F.2d 998 (5th Cir. 1969) 20

Moss v. *Gardner*, 411 F.2d 1195 (4th Cir. 1969) ... 20

Parker v. *Finch*, 327 F. Supp. 193 (N.D. Ga. 1971) 25

Ray v. *Gardner*, 387 F.2d 162 (4th Cir. 1967) 24

Rhinehart v. *Finch*, 438 F.2d 920 (9th Cir. 1971) 20

Richardson v. *Perales*, 402 U.S. 389 (1971) 20

Schmiedigen v. *Celebrezze*, 245 F. Supp. 825 (D.D.C. 1965) 31

PAGE

Sellars v. *Secretary of Health, Education and Welfare*, 458 F.2d 984 (8th Cir. 1972) 29

Sokoloff v. *Saxbe*, 501 F.2d 571 (2d Cir. 1974) 28

Staples v. *Gardner*, 357 F.2d 922 (5th Cir. 1966) .. 20

Stumbo v. *Gardner*, 365 F.2d 275 (6th Cir. 1966) .. 20

Summerhill v. *Secretary of Health, Education and Welfare*, 333 F. Supp. 43 (N.D. Tex. 1971) .. 26

Sweeney v. *Secretary of Health, Education and Welfare*, 379 F. Supp. 1098 (E.D N.Y. 1974) 26

Tuck v. *Finch*, 430 F.2d 1075 (4th Cir. 1970) 22

Walker-Hill Co. v. *United States*, 162 F.2d 259 (7th Cir. 1947), *cert. den.*, 322 U.S. 771, 68 S. Ct. 85, 92 L. Ed. 356 30

Walters v. *Gardner*, 397 F.2d 89 (6th Cir. 1968) .. 20

TABLE OF STATUTES

5 U.S.C. § 556(c)(8) 27

5 U.S.C. § 557(b) 28

42 U.S.C. § 402(d) 21

42 U.S.C. § 402(g) 21

42 U.S.C. § 402(i) 29

42 U.S.C. § 402(J)(1) 21

42 U.S.C. § 405(a) 28, 29

42 U.S.C. § 405(b) 28, 29

42 U.S.C. § 405(c)(2) 32

42 U.S.C. § 416(i) 24

TABLE OF REGULATIONS

	PAGE
20 C.F.R. 404.601	21, 27
20 C.F.R. 404.609	29
20 C.F.R. 404.613	21, 28
20 C.F.R. 404.616	29
20 C.F.R. 404.617	29
20 C.F.R. 404.940	28
20 C.F.R. 404.947	27, 28
20 C.F.R. 404.950(a)	27, 28
20 C.F.R. 404.956(b)	28
20 C.F.R. 422.501	23
20 C.F.R. 422.505	27

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-6004

NELLIE T. GOFF,

Appellant,

—v.—

CASPAR WEINBERGER, Secretary of Health, Education and Welfare, et al.,

Appellee.

BRIEF FOR THE APPELLEE

Statement of the Case

This action was commenced by the plaintiff on September 11, 1974, contesting a decision by the Secretary of Health, Education and Welfare. The action was brought pursuant to Section 205(g) of the Social Security Act, as amended, 42 U.S.C. 405(g), to review a "final decision" of the Secretary denying surviving child's insurance benefits to James Woolley, Patricia Woolley and Jane (Woolley) Turgeon, retroactive to March, 1959, and mother's insurance benefits to Nellie T. Goff, retroactive March, 1959. Plaintiff sought review and reversal of that decision. Plaintiff was denied relief by the United States District Court, Clarie, *J.*

On January 17, 1975, the defendant filed an Answer, after its Motion for Extension of Time to Answer was granted on November 26, 1974.

On June 13, 1975, the defendant filed a Motion for Summary Judgment and a Memorandum in Support of its Motion for Summary Judgment. On August 25, 1975, the plaintiff filed a Motion for Summary Judgment and a Memorandum in Support of its Motion for Summary Judgment.

On October 6, 1975, oral arguments were made by both parties before the District Court concerning their respective motions for summary judgment. On said date, plaintiff also filed a Supplemental Memorandum in Support of its Motion for Summary Judgment.

On October 17, 1975, Judge Clarie filed a decision granting Defendant's Motion for Summary Judgment.

On December 30, 1975, plaintiff filed a timely Notice of Appeal from the Judgment with the United States Court of Appeals for the Second Circuit.

Statement of Facts

Clayton E. Woolley died on March 31, 1959 from injuries suffered during the course of his employment by the State of Connecticut. At the time of his death, Woolley was covered by Workmen's Compensation and fully insured under the applicable regulations of the Social Security Act. Also, at the time of his death, Woolley was married to the plaintiff, Nellie T. Goff (who remarried on November 17, 1962), and had three living children, a stepchild, Jane (Woolley) Turgeon, born on June 1, 1949 and married during May, 1969; James Woolley, born on February 3, 1953; and Patricia Woolley, born on October 19, 1955.

The plaintiff, Nellie T. Goff, sought the advice of her attorney, Bernard Grabowski, relative to eligibility for

Social Security benefits for herself and her children shortly after her husband died. Her attorney contacted the Social Security Office in New Britain, Connecticut by telephone in order to determine whether Mrs. Goff and her children were eligible for Social Security benefits. She alleged that Mr. Grabowski was advised by an employee of the Social Security Office that since Mrs. Goff and her children were receiving Workmen's Compensation benefits, neither she nor her children were entitled to Social Security benefits.

In 1971, the plaintiff claimed that after hearing a public information announcement on the radio she learned that she and her children were, in fact, entitled to Social Security benefits since March 31, 1959. On January 28, 1971 Mrs. Goff filed a written application for surviving child's insurance benefits. Pursuant to that application, benefits were awarded to James Woolley and Patricia Woolley on April 14, 1971, with the payment of twelve months benefits retroactive from the date of the application. A lump-sum death benefit was also awarded.

Dissatisfied with the above results, a request for reconsideration and an application for child's insurance benefits was made for James Woolley and Patricia Woolley from March 31, 1959, child's insurance benefits for Jane (Woolley) Turgeon from March 31, 1959 to May 10, 1969 (the date on which she was married), and mother's insurance benefits for plaintiff from March 31, 1959 to November 17, 1962, at which time she married her present husband. On May 9, 1973, Bernard Levine, Chief of the Reconsideration Branch of the Social Security Administration, affirmed the initial determination and allowed child's insurance benefits for James and Patricia Woolley retroactive to January, 1970, but denied child's insurance benefits to Jane (Woolley) Turgeon and mother's insurance benefits to the plaintiff.

The plaintiff appealed the reconsideration determination to the Bureau of Hearings and requested a hearing before an Administrative Law Judge. The hearing was held on December 19, 1973. Subsequent to the hearing, Attorney Grabowski informed the Administrative Law Judge in a letter addressed to him dated January 3, 1974, and again by sworn affidavit on April 10, 1974, that he did, in fact, contact the Social Security Office in New Britain, Connecticut by telephone to inquire as to the eligibility of the plaintiff and her children for Social Security benefits. On March 11, 1974 the Administrative Law Judge filed his decision awarding child's insurance benefits to James and Patricia Woolley effective as of March 31, 1959, child's insurance benefits to Jane (Woolley) Turgeon from March 31, 1959 to May 10, 1969, and mother's insurance benefits to the plaintiff from March 31, 1959 to November 17, 1962.

The Appeals Council by its own motion on April 2, 1974, notified the plaintiff of its decision to review the Administrative Law Judge's decision. On July 22, 1974, after a hearing had been held, the Appeals Council overruled the decision of the Administrative Law Judge and awarded child's insurance benefits to only James and Patricia Woolley retroactive to January, 1970. From that decision, the plaintiff appealed to the United States District Court for the District of Connecticut on September 11, 1974. On October 6, 1975, oral argument was heard on Cross-Motions for Summary Judgment; and, in a decision rendered by the Honorable T. Emmet Clarie, Chief Judge, dated October 17, 1975, the Court granted the Defendant's Motion for Summary Judgment. Accordingly, Judgment was entered on November 28, 1975.

Statutes and Regulatory Provisions Involved

Section 202(d), 42 U.S.C. 402(d), provides that:

"(1) Every child (as defined in section 416(e) of this title) of an individual entitled to old-age or disability insurance benefits, of an individual who dies a fully or currently insured individual, if such child—

(A) has filed application for child's insurance benefits,

(B) at the time such application was filed was unmarried and (i) either had not attained the age of 18 or was a full-time student and had not attained the age of 22, or (ii) is under a disability (as defined in section 423(d) of this title) which began before he attained the age of 22, and

(C) was dependent upon such individual—

(i) if such individual is living, at the time such application was filed.

(ii) if such individual has died, at the time of such death, or

(iii) if such individual had a period of disability which continued until he became entitled to old-age or disability insurance benefits, or (if he has died) until the month of his death, at the beginning of such period of disability or at the time he became entitled to such benefits,

shall be entitled to a child's insurance benefit for each month, beginning with the first month after August 1950 in which such child becomes so entitled to such insurance benefits and ending with the month preceding whichever of the following first occurs—

(D) the month in which such child dies or marries,

(E) the month in which such child attains the age of 18, but only if he (i) is not under a disability (as so defined) at the time he attains such age, and (ii) is not a full-time student during any part of such month,

(F) if such child was not under a disability (as so defined) at the time he attained the age of 18, the earlier of—

(i) the first month during no part of which he is a full-time student, or

(ii) the month in which he attains the age of 22,

but only if he was not under a disability (as so defined) in such earlier month; or

(G) if such child was under a disability (as so defined) at the time he attained the age of 18, or if he was not under a disability (as so defined) at such time but was under a disability (as so defined) at or prior to the time he attained (or would attain) the age of 22, the third month following the month in which he ceases to be under such disability or (if later) the earlier of—

(i) the first month during no part of which he is a full-time student, or

(ii) the month in which he attains the age of 22,

but only if he was not under a disability (as so defined) in such earlier month.

Entitlement of any child to benefits under this subsection on the basis of the wages and self-employment income of an individual entitled to disability insurance benefits

shall also end with the month before the first month for which such individual is not entitled to such benefits unless such individual is, for such later month, entitled to old-age insurance benefits or unless he dies in such month. No payment under this paragraph may be made to a child who would not meet the definition of disability in section 423(d) of this title except for paragraph (1)(B) thereof for any month in which he engages in substantial gainful activity.

(2) Such child's insurance benefit for each month shall, if the individual on the basis of whose wages and self-employment income the child is entitled to such benefit has not died prior to the end of such month, be equal to one-half of the primary insurance amount of such individual for such month. Such child's insurance benefit for each month shall, if such individual has died in or prior to such month, be equal to three-fourths of the primary insurance amount of such individual.

(3) A child shall be deemed dependent upon his father or adopting father or his mother or adopting mother at the time specified in paragraph (1)(C) of this subsection unless, at such time, such individual was not living with or contributing to the support of such child and—

(A) such child is neither the legitimate nor adopted child of such individual, or

(B) such child has been adopted by some other individual.

For purposes of this paragraph, a child deemed to be a child of a fully or currently insured individual pursuant to section 416(h)(2)(B) or section 416(h)(3) of this title shall be deemed to be the legitimate child of such individual.

(4) A child shall be deemed dependent upon his stepfather or stepmother at the time specified in paragraph (1)(C) of this subsection, if, at such time, the child was living with or was receiving at least one-half of his support from such stepfather or stepmother.

(5) In the case of a child who has attained the age of eighteen and who marries—

(A) an individual entitled to benefits under subsection (a), (b), (e), (f), (g), or (h) of this section or under section 423(a) of this title, or

(B) another individual who has attained the age of eighteen and is entitled to benefits under this subsection.

such child's entitlement to benefits under this subsection shall, notwithstanding the provisions of paragraph (1) of this subsection but subject to subsection (s) of this section, not be terminated by reason of such marriage; except that, in the case of such a marriage to a male individual entitled to benefits under section 423(a) of this title or this subsection, the preceding provisions of this paragraph shall not apply with respect to benefits for months after the last month for which such individual is entitled to such benefits under section 423(a) of this title or this subsection unless (i) he ceases to be so entitled by reason of his death, or (ii) in the case of an individual who was entitled to benefits under section 423(a) of this title, he is entitled, for the month following such last month, to benefits under subsection (a) of this section.

(6) A child whose entitlement to child's insurance benefits on the basis of the wages and self-employment income of an insured individual terminated with the month preceding the month in which such child attained the age of 18, or with a subsequent month, may again

become entitled to such benefits (provided no event specified in paragraph (1)(D) has occurred) beginning with the first month thereafter in which he—

(A)(i) is a full-time student or is under a disability (as defined in section 423(d) of this title), and (ii) had not attained the age of 22, or

(B) is under a disability (as so defined) which began before the close of the 84th month following the month in which his most recent entitlement to child's insurance benefits terminated because he ceased to be under such disability.

but only if he has filed application for such reentitlement. Such reentitlement shall end with the month preceding which ever of the following first occurs:

(C) the first month in which an event specified in paragraph (1)(D) occurs;

(D) the earler of (i) the first month during no part of which he is a full-time student or (ii) the month in which he attains the age of 22, but only if he is not under a disability (as so defined) in such earlier month; or

(E) if he was under a disability (as so defined), the third month following the month in which he ceases to be under such disability or (if later) the earlier of—

(i) the first month during no part of which he is a full-time student, or

(ii) the month in which he attains the age of 22.

(7) For the purposes of this subsection—

(A) A "full-time student" is an individual who is in full-time attendance as a student at

an educational institution, as determined by the Secretary (in accordance with regulations prescribed by him) in the light of the standards and practices of the institutions involved, except that no individual shall be considered a "full-time student" if he is paid by his employer while attending an educational institution at the request or pursuant to a requirement, of his employer.

(B) Except to the extent provided in such regulations, an individual shall be deemed to be a full-time student during any period of nonattendance at an educational institution at which he has been in full-time attendance if (i) such period is 4 calendar months or less, and (ii) he shows to the satisfaction of the Secretary that he intends to continue to be in full-time attendance at an educational institution immediately following such period. An individual who does not meet the requirement of clause (ii) with respect to such period of nonattendance shall be deemed to have met such requirement (as of the beginning of such period) if he is in full-time attendance at an educational institution immediately following such period.

(C) An "educational institution" is (i) a school or college or university operated or directly supported by the United States, or by any State or local government or political subdivision thereof, or (ii) a school or college or university which has been approved by a State or accredited by a State-recognized or nationally-recognized accrediting agency or body, or (iii) a nonaccredited school or college or university whose credits are accepted, on transfer, by not less than three institutions which are so accredited, for credit on the same basis as if transferred from an institution so accredited.

(D) A child who attains age 22 at a time when he is a full-time student (as defined in subparagraph (A) of this paragraph and without application of subparagraph (B) of such paragraph) but has not (at such time) completed the requirements for, or received, a degree from a four-year college or university shall be deemed (for purposes of determining whether his entitlement to benefits under this subsection has terminated under paragraph (1)(F) and for purposes of determining his initial entitlement to such benefits under clause (i) of paragraph (1)(B) not to have attained such age until the first day of the first month following the end of the quarter or semester in which he is enrolled at such time (or, if the educational institution (as defined in this paragraph) in which he is enrolled is not operated on a quarter or semester system, until the first day of the first month following the completion of the course in which he is so enrolled or until the first day of the third month beginning after such time, whichever first occurs).

(8) In the case of—

(A) an individual entitled to old-age insurance benefits (other than an individual referred to in subparagraph (B), or

(B) an individual entitled to disability insurance benefits, or an individual entitled to old-age insurance benefits who was entitled to disability insurance benefits for the month preceding the first month for which he was entitled to old-age insurance benefits,

a child of such individual adopted after such individual became entitled to such old-age or disability insurance

benefits shall be deemed not to meet the requirements of clause (i) or (iii) of paragraph (1)(C) unless such child—

> (C) is the natural child or stepchild of such individual (including such a child who was legally adopted by such individual), or
>
> (D)(i) was legally adopted by such individual in an adoption decreed by a court of competent jurisdiction within the United States,
>
> (ii) was living with such individual in the United States and receiving at least one-half of his support from such individual (I) if he is an individual referred to in subparagraph (A), for the year immediately before the month in which began the period of disability of such individual which still exists at the time of adoption (or, if such chld was adopted by such individual after such individual attained age 65, the period of disability of such individual which existed in the the month preceding the month in which he attained age 65), or the month in which such individual became entitled to disability insurance benefits, or (III) if he is an individual referred to in either subparagraph (A) or subparagraph (B) and the child is the grandchild of such individual or his or her spouse, for the year immediately before the month in which such child files his or her application for child's insurance benefits, and
>
> (iii) had not attained the age of 18 before he began living with such individual.

In the case of a child who was born in the one-year period during which such child must have been living with and receiving at least one-half of his support from such individual, such child shall be deemed to meet such re-

quirements for such period if, as of the close of such period, such child has lived with such individual in the United States and received at least one-half of his support from such individual for substantially all of the period which begins on the date of birth of such child.

(9)(A) A child who is a child of an individual under clause (3) of the first sentence of section 416(e) of this title and is not a child of such individual under clause (1) or (2) of such first sentence shall be deemed not to be dependent on such individual at the time specified in subparagraph (1)(C) of this subsection unless (i) such child was living with such individual in the United States and receiving at least one-half of his support from such individual (I) for the year immediately before the month in which such individual became entitled to old-age insurance benefits or disability insurance benefits or died, or (II) if such individual had a period of disability which continued until he had become entitled to old-age insurance benefits, or disability insurance benefits, or died, for the year immediately before the month in which such period of disability began, and (ii) the period during which such child was living with such individual began before the child attained age 18.

(B) In the case of a child who was born in the one-year period during which such child must have been living with and receiving at least one-half of his support from such individual, such child shall be deemed to meet such requirements for such period if, as of the close of such period, such child has lived with such individual in the United States and received at least one-half of his support from such individual for substantially all of the period which begins on the date of such child's birth."

Section 202(g), 42 U.S.C. 402(g), provides that:

"(1) The widow and every surviving divorced mother (as defined in section 416(d) of this title) of an in-

dividual who died a fully or currently insured individual, if such widow or surviving divorced mother—

(A) is not married,

(B) is not entitled to a widow's insurance benefit.

(C) is not entitled to old-age insurance benefits, or is entitled to old-age insurance benefits each of which is less than three-fourths of the primary insurance amount of such individual.

(D) has filed application for mother's insurance benefits, or was entitled to wife's insurance benefits on the basis of the wages and self-employment income of such individual for the month preceding the month in which he died.

(E) at the time of filing such application has in her care a child of such individual entitled to a child's insurance benefit, and

(F) in the case of a surviving divorced mother—

(i) the child referred to in subparagraph (E) is her son, daughter, or legally adopted child, and

(ii) the benefits referred to in such subparagraph are payable on the basis of such individual's wages and self-employment income,

shall (subject to subsection (s) of this section) be entitled to a mother's insurance benefit for each month, beginning with the first month after August 1950 in which she becomes so entitled to such insurance benefits and ending with the month preceding the first month in which any of the following occurs: no child of such deceased individual is entitled to a child's insurance benefit, such widow or surviving divorced mother becomes entitled to

an old-age insurance benefit equal to or exceeding three-fourths of the primary insurance amount of such deceased individual, she becomes entitled to a widow's insurance benefit, she remarries, or she dies. Entitlement to such benefits shall also end, in the case of a surviving divorced mother, with the month immediately preceding the first month in which no son, daughter, or legally adopted child of such surviving divorced mother is entitled to a child's insurance benefit on the basis of the wages and self-employment income of such deceased individual.

(2) Such mother's insurance benefit for each month shall be equal to three-fourths of the primary insurance amount of such deceased individual.

(3) In the case of a widow or surviving divorced mother who marries—

(A) an individual entitled to benefits under subsection (a), (f), or (h) of this section, or under section 423(a) of this title, or

(B) an individual who has attained the age of eighteen and is entitled to benefits under subsection (d) of this section,

the entitlement of such widow or surviving divorced mother to benefits under this subsection shall, notwithstanding the provisions of paragraph (1) of this subsection but subject to subsection(s) of this section, not be terminated by reason of such marriage; except that, in the case of such a marriage to an individual entitled to benefits under section 423(a) of this title or subsection (d) of this section, the preceding provisions of this paragraph shall not apply with respect to benefits for months after the last month for which such individual is entitled to such benefits under section 423(a) of this title or subsection (d) of this section unless (i) he ceases to be so

entitled by reason of his death, or (ii) in the case of an individual who was entitled to benefits under section 423(a) of this title, he is entitled, for the month following such last month, to benefits under subsection (a) of this section."

Section 202 (J)(1), 42 U.S.C. 402(J)(1), provides that:

"An individual who would have been entitled to a benefit under subsections (a) to (g) or (h) of this section for any month after August 1950 had he filed application therefor prior to the end of such month shall be entitled to such benefit for such month if he files application therefor prior to the end of the twelfth month immediately succeeding such month. Any benefit under this subchapter for a month prior to the month in which application is filed shall be reduced, to any extent that may be necessary, so that it will not render erroneous any benefit which, before the filing of such application, the Secretary has certified for payment for such prior month."

Section 205(a), 42 U.S.C. 405(a), provides that:

> "The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this title, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the method of taking and furnishing the same in order to establish the right to benefits hereunder."

The regulations of 20 C.F.R. 404.601 provide in pertinent part as follows:

> "(b) . . . The term 'applicant' for purposes of this subpart refers to the individual who has filed an application . . .

> (c) . . . Unless otherwise specified, the term 'application' refers only to an application on a form prescribed in Section 404.602, and includes an application for monthly benefits . . .
>
> (d) . . . an individual has not 'filed an application' for purposes of Sections 202, 216(i), or 223 of the Act . . . until an application on a form prescribed in Section 404.602 has been filed in accordance with the regulations in this subpart.
>
> (e) . . . The term 'to execute an application' (or a written statement, request, or notice . . .) means the completion and signing of the application (or written statement, request, or notice).'

The regulation of 20 C.F.R. 404.602 provides that:

> "Applications shall be made as provided in this Subpart 6 on such forms and in accordance with such instructions . . . as are prescribed by the Administration. . . ."

The regulation of 20 C.F.R. 404.608(a) provides that:

> ". . . an application (or written statement, request, or notice) is considered to have been filed only as of the date it is received at an office or the Social Security Administration or by an employee of the Social Security Administration, who has been authorized to receive such application (or written statement, request, or notice). . . ."

The regulations of 20 C.F.R. 404.603 provide in pertinent part as follows:

> "(a) . . . Where an individual files a written statement with the Administration . . . that indicates an intention to claim monthly benefits . . . and such statement bears his signature . . ., the

filing of such written statement is, unless otherwise indicated, considered to be the filing of an application for such purposes, provided:

(1) The individual or proper party on his behalf . . . executes a prescribed application form . . . that is filed with one Administration during the individual's lifetime and within the prescribed period in paragraph (c)(1) of this section . . .

(b) . . . A written statement filed by a person that indicates an intention to claim on behalf of another person monthly benefits . . . is, unless otherwise indicated, considered to be the filing of an application for such purposes, provided:

(1) The written statement bears the signature . . . of the person filing the statement;

(2) The statement is filed by . . .

(ii) a proper party to execute an application on a prescribed form on behalf of a claimant as determined by Section 404.603 . . .

(c) . . . After the Administration has received from an individual a written statement as described in paragraph (a) or (b) of this section:

(1) Notice in writing shall be sent to such individual . . . stating that an initial determination will be made with respect to such written statement if a prescribed application form . . . is filed with the Administration within six months from the date of such notice . . .

(2) If, after notice as described in this paragraph has not been sent, a prescribed ap-

plication form is not filed (in accordance with the provision paragraph (a) and (b) of this section) within the applicable period prescribed in subparagraph (1) or (2) of this paragraph, it will be deemed that the filing of the written statement to which such notice refers is not to be considered the filing of an application for the purposes set forth in (a) and (b) of this section."

Questions Presented

A. Did the trial court err in holding that the oral inquiry concerning entitlement to Survivor's Insurance Benefits made by Attorney Bernard Grabowski on behalf of Nellie T. Goff in 1959 did not constitute an intent to claim Survivor's Insurance Benefits pursuant to the Social Security Act?

B. Did the trial court err in holding that the requirement of a written statement of intent to claim Survivor's Insurance Benefits pursuant to the Social Security Act had not been properly waived by the hearing examiner?

ARGUMENT

A. The trial court did not err in holding that the oral inquiry concerning entitlement to survivor's insurance benefits made by attorney Bernard Grabowski on behalf of Nellie T. Goff in 1959 did not constitute an intent to claim survivor's insurance benefits pursuant to the Social Security Act.

In Social Security cases, the Secretary of Health, Education and Welfare is charged with the duty to weigh the evidence to resolve material conflicts in the testimony and to determine the cases accordingly. *Richardson* v. *Perales*, 402 U.S. 389 (1971); *Moss* v. *Gardner*, 411 F.2d 1195 (4th Cir. 1969); *Staples* v. *Gardner*, 357 F.2d 922 (5th Cir. 1966); *Stumbo* v. *Gardner*, 365 F.2d 275 (6th Cir. 1966); *Celebrezze* v. *Bolas*, 316 F.2d 498 (8th Cir. 1963); *Rhinehart* v. *Finch*, 438 F.2d 920 (9th Cir. 1971). The findings of the Secretary are conclusive, if supported by substantial evidence; and, if the law is properly applied, they should be upheld even if a reviewing court, had it heard the same evidence *de novo*, might have found otherwise. *Labee* v. *Cohen*, 408 F.2d 998 (5th Cir. 1969); *Walters* v. *Gardner*, 397 F.2d 89 (6th Cir. 1968).

There is no dispute as to the eligibility of the plaintiff and her three children to Survivor's Insurance benefits under the Social Security Act on the account of Clayton Woolley's death as of March 31, 1959. The issue is whether the oral inquiry concerning entitlemnet to Survivor's Insurance benefits made by Attorney Bernard Grabowski on behalf of Nellie T. Goff in 1959 constituted an intent to claim Survivor's Insurance benefits pursuant to the Social Security Act. Although an individual may be eligible, the Social Security Act requires the filing of an application for entitlement to benefits and limits the

retroactivity of entitlement to 12 months prior to the month within which the application is filed. 42 U.S.C. § 402(d), (g), (J)(1).

Section 404.601 of the Social Security Regulations, 20 C.F.R. § 404.601, states that the term "application" refers only to an application on a prescribed form, and that an individual is not considered to have filed an application for Social Security benefit purposes until an application on a prescribed form is filed. Although the regulations permit the use of a writing which indicates an intent to file or a written request for benefits other than on a prescribed form, such writing is considered to be an application only for the purpose of establishing a filing date and is not an application *per se*. 20 C.F.R. 404.613. This notwithstanding, an oral inquiry cannot reasonably be construed as a request or intent to file for benefits under 20 C.F.R. 404.613, which expressly requires a written statement. This policy was also recognized by the District Court in the opinion of Chief Justice Clarie:

> ". . . § 404.613 of these regulations provides, that if an individual files a written statement with the Social Security Administration, which indicates an intention to claim benefits and such statement bears his signature, the filing of such statement shall be considered to be the filing of an application for such benefits. Thus the administrative purpose of the Act and its supporting regulations were specifically designed to assure, that only a written expression of intent to claim Social Security Benefits should be accepted and considered as a valid application under the law . . ."
>
> * * * * *
>
> "The Social Security Act, supplemented by its regulations, was intended to eliminate or at least reduce to a minimum the possibility of fraud, confusion, and laxity in its administration. The vast-

> ness of the program makes it essential to adhere to the written application procedure, if there is to be an orderly and controllable system of management for approving claims and paying out insurance benefits." (4-5a).*

In the instant case, the plaintiff's attorney, Bernard Grabowski, made an inquiry by telephone to the Social Security Office in New Britain, Connecticut in order to determine whether Mrs. Goff and her children were eligible for Social Security benefits. Mr. Grabowski was advised that since the plaintiff and her children were receiving Workmen's Compensation benefits, neither she nor her children were entitled to Social Security benefits. This inquiry was corroborated and substantiated by a letter and affidavit of Attorney Grabowski. As a result of the circumstances of this case, plaintiff contends that failure to satisfy the technicality of a written application should not prevent the claimant from receiving Social Security benefits. However, the requirement of the regulations that an application must be in writing and that an oral claim cannot constitute an application must be in writing and that an oral claim cannot constitute an application has been held to be a proper exercise of regulatory authority. *Bender* v. *Celebrezze*, 332 F.2d 113 (7th Cir. 1964); *Abel* v. *Secretary of Health, Education and Welfare*, Civil No. 15,496 (D. Conn. July 1, 1974); *Flamm* v. *Ribicoff*, 203 F. Supp. 507 (S.D. N.Y. 1961).

The plaintiff further claims that the corroboration by Attorney Grabowski, along with other circumstances, brings the present case within the holding of *Tuck* v. *Finch*, 430 F.2d 1075 (4th Cir. 1970).

The issue in *Tuck*, *supra*, was whether the plaintiff acquired four (4) quarters of coverage in 1961 to meet

---

* Reference marked "a" refers to Government's Appendix.

the insured status requirements for disability purposes. By finding that Mr. Tuck filed an application for benefits in February, 1965, when he had inquired orally at a Social Security Office about benefits, the Court was then able to indicate that the Secretary could change his records of Tuck's self-employment income in 1961 under Section 205(c)5)(A) of the Act since the February, 1965 application tolled the statute of limitations until a "final" decision was made. Thus, *Tuck, supra*, involved a question of the filing of an application for purposes of Section 205(c)(5)(A) rather than for purposes of entitlement under Sections 202(d) and 223(g) of the Act.

The relevant portion of the Court's decision is as follows:

> "The Secretary has prescribed application forms for disability insurance benefits. 20 C.F.R. §§ 422.501 and 505. Ordinarily an application made on the form will conclusively establish the date it was filed. Use of a form, however, does not appear to be mandatory, and its absence does not conclusively establish that no application was made, especially when the applicant is illiterate. Here the Secretary's own records affirmatively show that in February, 1965, Tuck asked about receiving Social Security benefits and that an official of the Social Security Administration discussed his application with him. While a written application might be expected from a literate person, an illterate often can do little other than make an oral request to the official to whom he has been referred."
>
> * * * * *
>
> ". . . We hold, therefore, that Tuck's oral request for benefits and the records of the Secretary establish that in February, 1965 Tuck made an application for monthly benefits. Therefore, under Section 205(c)(5)(A) of the Act, the Secre-

> tary may change his records so they will correctly reflect the number of quarters of coverage to which Tuck is entitled."

The crucial factor distinguishing *Tuck, supra,* from the present case is that the Secretary's records corroborated Tuck's claim. Here, there is no record by the Secretary of the alleged oral inquiry. Also, in *Tuck, supra,* the individual inquiring as to eligibility was an illiterate, who appeared before a Social Security official; while, in the instant case, an attorney consulted the Social Security Administration.

The existence of a record was the Court's basis for distinguishing *Tuck, supra,* from *Ray* v. *Gardner,* 387 F.2d 162 (4th Cir. 1967). In 1958, Ray, the claimant, filed an application for a period of disability pursuant to § 213(i) of the Social Security Act. 42 U.S.C. 416(i). The statute was subsequently amended in 1960 to permit persons under fifty years of age to receive monthly disabiilty benefits, but only upon an application for such benefits filed in or after the month in which the amendment was enacted. Ray was less than fifty years old in 1958 and the only benefit to which he was entitled was the elimination of the period of disability from his earnings record.

At a hearing in December, 1960 the claimant was informed of the amendment to the Act, and contended that promptly thereafter he filed a claim for disability benefits. His testimony was corroborated in part by his wife who said that she collected certain papers for his use in that connection. The records of the Social Security Administration contained no indication of the filing of any such claim until September, 1964.

In an appeal to the Fourth Circuit Court of Appeals, the Court ruled as follows:

> ". . . the District Court properly accepted the administrative finding that no claim for disability benefits had been filed before the 1964 claim. The fact that no such claim was to be found in the records of the Social Security Administration and that there was no notation or reocrd of the receipt or filing of any such claim, if not conclusive, furnish substantial evidence in support of the finding. The factfinder was not bound to accept the self-serving testimony of the claimant and his wife, otherwise unsubstantiated, to the contrary."

Similarly, in *Parker* v. *Finch*, 327 F. Supp. 193 (N.D. Ga. 1971), the Court arrived at the same conclusion.

In *Parker*, *supra*, the plaintiff attempted to secure disability benefits from Social Security as far back as 1957. However, it appeared that he did not file an application in any form until March 5, 1968. The District Court held:

> ". . . Section 423(a)(1) provides that in order for an individual to be entitled to disability benefits he must file an application for the benefits. The fact that no such claim was to be found in the records of the Social Security Administration and that there was no record of the receipt or filing of such claim, furnishes substantial, if not conclusive, evidence in support of the Examiner's finding."

Accordingly, as the Appeals Council of the Social Security Administration in the case at hand stated:

> "It would, therefore, appear because of the dissimilarities in the two cases (*Tuck* and the one at hand), that the Court's findings in the *Tuck* case are not applicable to the present proceeding. Moreover, the Social Security Administration has not acquiesced in the *Tuck* decision nor has it

effected any policy changes based on that decision" (14a).

In addition, the great weight of court decisions support the Social Security Administration's regulation with regard to what constitutes an application. For example, where there is no record for a wirtten request for benefits, the claimant was held not to have established a condition precedent for entitlement. *Sweeney* v. *Secretary of Health, Education and Welfare*, 379 F. Supp. 1098 (E.D. N.Y. 1974); *Bender* v. *Celebrezze*, 332 F.2d 113 (7th Cir. 1964). Further, the filing of a wrtiten statement of intention to claim benefits has been held as a minimum requirement for entitlement for benefits. *Summerhill* v. *Secretary of Health, Education and Welfare*, 333 F. Supp. 43 (N.D. Tex. 1971); *Flamm* v. *Ribicoff*, 203 F. Supp. 507 (D.C. N.Y. 1961).

The facts in the present case clearly contain substantial evidence to support the Secretary's finding that Nellie T. Goff failed to file a written application for Survivor's Insurance benefits until January 28, 1971.

It is uncontroverted that the records of the Social Security Administration did not contain any evidence that the plaintiff had applied for monthly benefits; and that fact is substantial evidence that a proper claim did not exist. *Ray* v. *Gardner, supra; Parker* v. *Finch, supra.* Further, there was no contention that either plaintiff or her attorney filed a written application for benefits prior to 1971.

Accordingly, the trial court was correct in holding that the oral inquiry concerning entitlement to Survivor's Insurance benefits made by Attorney Bernard Grabowski on behalf of Nellie T. Goff in 1959 did not constitute an intent to claim Survivor's Insurance benefits pursuant to

the Social Security Act, and that the sworn affidavit of Attorney Grabowski and the testimony of Nellie T. Goff was not substantial evidence that the plaintiff was entitled to Survivor's Insurance benefits retroactive to March 31, 1959.

B. The trial court did not err in holding that the requirement of a written statement of intent to claim survivor's insurance benefits pursuant to the Social Security Act had not been properly waived by the hearing examiner.

The plaintiff contends that she was entitled to Survivor's Insurance benefits retroactive to 1959 because the Administrative Law Judge waived the Secretary's requirement of a written statement of intent to claim benefits. Although the record revealed that the Administrative Law Judge did, in fact, purport to waive any requirement of a written application, such a waiver was neither within his authority nor binding upon the Secretary.

The Secretary has full rulemaking authority, including the power to establish procedures, to carry out the Social Security Act. Section 205(a), 42 U.S.C. § 405(a). Moreover, the authority to make findings of fact and to make decisions affecting the rights of claimants is vested in the Secretary. Social Security Act § 205(b), 42 U.S.C. 405(b). The Secretary's duly promulgated regulations provide for discretionary Appeals Council review of any decision made by an Administrative Law Judge. 20 C.F.R. §§ 404.947, 404.950(a). Furthermore, the Secretary's regulations set forth the requirements to be met in making an application for benefits. 20 C.F.R. § 404.601 *et seq.*

An Administrative Law Judge has the authority to "make or recommend decisions". 5 U.S.C. § 556(c)(8).

However, upon review of the Hearing Examiner's decision, "the agency has all the powers which it would have in making the initial decision . . ." 5 U.S.C. § 557(b). The courts have interpreted these provisions to mean that an Administrative Law Judge's decision is a recommendation only, and is not binding upon the agency. *Sokoloff* v. *Saxbe*, 501 F.2d 571, 576 (2d Cir. 1974); *Alcoa Steamship Co., Inc.* v. *Federal Maritime Comm.*, 321 F.2d 756, 758 n.5 (D.C. Cir. 1963). The agency is free to "make any findings or conclusions which in its judgment are proper on the record, notwithstanding a different determination by the Examiner." *Fink* v. *S.E.C.*, 417 F.2d 1058 (2d Cir. 1969). Thus, in the present case, the Administrative Law Judge's purported waiver was a mere recommendation which the Secretary was not obliged to accept. Nor was the recommendation legally acceptable under the Secretary's regulations.

The inability of the Administrative Law Judge to waive the requirements of 20 C.F.R. § 404.613 can also be inferred from the provisions of the Social Security Act. Section 205(a) of the Act, 42 U.S.C. § 405(a), authorizes the Secretary to promulgate such rules and regulations as are necessary to carry out the Act's provisions. Pursuant to this authority, the Secretary has enacted 20 C.F.R. § 404.613, which requires that applicants file written statements. To allow a Hearing Examiner to waive this requirement would, in effect, negate the Secretary's authority to promulgate regulations. Such a ruling would also conflict with the Secretary's right to "make findings of fact, and decisions as to the rights of any individual applying for a payment under this title." Social Security Act § 205(b), 42 U.S.C. § 405(b). Accordingly, the Secretary has enacted regulations which provide that the decicisions of an Administrative Law Judge may be revised by the Appeals Council. 20 C.F.R. §§ 404.940, 404.947, 404.950(a), and 404.956(b). The regulation at 20 C.F.R.

§ 404.940 implements the power of the Secretary to determine *inter alia* what effect an Administrative Law Judge's decision has. Social Security Act § 205(a) and (b), 42 U.S.C. § 405(a) and (b).

Although the Administrative Law Judge was an employee of the Federal Government, he did not sit as a representative of the Secretary. See *Garrett* v. *Richardson*, 363 F. Supp. 83 (D. S.C. 1973); *Hennig* v. *Gardner*, 276 F. Supp. 622 (N.D. Tex. 1967). The Administrative Law Judge exercises a judicial function: to develop fully and fairly all the relevant facts at the hearing. *Sellars* v. *Secretary of Health, Education and Welfare*, 458 F.2d 984, 986 (8th Cir. 1972). To allow him to act as the Secretary's representative by waiving the requirements of the Social Security Act would, as Chief Judge Clarie found, "destroy the quasi-judicial character of the Administrative Law Judge" (6a).

The plaintiff contends that since the Secretary waived the two-year limitation for applying for lump-sum death benefits, he should also have wavied the requirement of a written statement of intention to claim monthly benefits. Although the regulations set a limitation of two years after the insured individual's death for the filing of an application for the death benefit, they also provide an exception when there is good cause for failure to file the application within the initial two-year period, such as circumstances beyond the individual's control or incorrect information furnished the individual by the Administration. 20 C.F.R. §§ 404.609, 404.616, and 404.617. A lump-sum death benefit, provided for under Social Security Act § 202(i), 42 U.S.C. § 402(i), is different from monthly Social Security benefits. The regulations do not provide for any exceptions in the time limitation with respect to filing for monthly Social Security benefits. Moreover, the fact that the Secretary expressly provided for an excep-

tion to the application requirements for lump-sum death benefits indicates that if he had intended a similar exception to be applied for applications for monthly benefits, he would have so specified in the regulations.

Plaintiff also intimates that estoppel is appropriate because of misinformation given to her attorney by an employee of the Social Security Administration. However, as stated by Judge Clarie:

> "The Government cannot be estopped in this manner from insisting upon the performance of statutory conditions precedent, by the unauthorized acts of a local Social Security office employee."
>
> "But even assuming that he did receive 'misinformation' on which . . . acted to her detriment, it is plain that estoppel will not lie against the Government under these circumstances. Parties dealing with the Government are charged with knowledge of and are bound by statutes and lawfully promulgated regulations despite reliance to their pecuniary detriment upon incorrect information received from Government agents or employees. Failure to comply with the applicable statute and regulations precludes recovery against the Government 'no matter with what good reason' the claimant believed she had come within the requirements. Estoppel will not lie regardless of the financial hardship 'resulting from innocent ignorance'. *Federal Crop Insurance Corp.* v. *Merrill*, 332 U.S. 380, 68 S. Ct. 1, 92 L. Ed. 10; *Walker-Hill Co.* v. *United States*, 162 F.2d 259 (7th Cir. 1947), cert. den. 332 U.S. 717, 68 S. Ct. 85, 92 L. Ed. 356; *James* v. *United States*, 185 F.2d 115, 22 A.L.R. 2d 380 (4th Cir. 1950). *Flamm* v. *Ribicoff*, 203 F. Supp. 507, 510 S.D. N.Y. 1961)" (5-6a).

The cases icted in plaintiff's brief in support of the position that waiver is appropriate to apply to the facts at hand are distinguishable.

In *Schmiedigen* v. *Celebrezze*, 245 F. Supp. 825 (D.D.C. 1965), the Court construed 42 U.S.C. 402(i) which accorded a lump-sum payment at death to the person determined by the Secretary of Health, Education and Welfare to be the "widow or widower of the deceased and to have been living in the same household with the deceased at the time of death." At the time of her husband's death, the plaintiff (represented by a conservator) was a patient confined to a mental institution. After carving out an exception for mentally incompetent persons, the trial judge discussed an administrative regulation relied upon by Government counsel which defined the phrase "living in the same household."

> ". . . It (the regulation) proceeds to define absences of certain types as being temporary. Counsel for the Government points to the fact that this case does not come within the scope of any of the enumerated definitions. They should not be deemed exclusive or exhaustive. The actions of a mentally incompetent person, who is not responsible for his or her acts, must be by necessary implication excepted from the statutory requirements."

It is clear that the District Court by implication provided an exception for individuals who through *mental illness* were excused of responsibility for their actions. Here, the mental competency of the plaintiff is not in issue. In addition, she was represented by legal counsel.

In *Ewing* v. *Black*, 172 F.2d 331 (6th Cir. 1949), the Court, likewise, was faced with a problem of interpreting a Social Security statute. The case involved employers who made regular deductions at the lawful percentage

rate from the wage commissions of an employee (plaintiff), but at no time did the employers report officially any wages paid the employee or any amounts deducted from his wages for Social Security taxes. Plaintiff wanted to introduce records of past years to qualify as a fully insured individual under the Social Security Act but was precluded by a four-year statute of limitations specifically stated to be conclusive. 42 U.S.C. 405(c)(2).

The Court resolved the matter as follows:

> "... That issue does not involve a revision of the records of the Board. This is not a case of challenging the conclusiveness of records. There are no records to challenge ... Section 205(c)(2) of the Act, reasonably construed, constitutes no bar to the Board's receiving these records and making them official, so that the employee may obtain his just benefits under the Social Security Act."

The Court concluded that the four-year statute was not applicable under the circumstances. However, it did not waive the mandate of the statute, which is what the plaintiff in the case at bar requests.

Accordingly, the District Court did not err in holding that the requirement of a written statement of intent to claim Survivor's Insurance benefits pursuant to the Social Security Act had not been properly waived by the Hearing Examiner.

CONCLUSION

The judgment of the trial court was correct and therefore should be affirmed in that oral inquiry concerning entitlement to survivor's insurance benefits made by attorney Bernard Grabowski on behalf of Nellie Goff in 1959 did not constitute an intent to claim survivor's insurance benefits pursuant to the Social Security Act and that the requirement of a written statement of intent to claim survivor's insurance benefits pursuant to said act had not been properly waived by the hearing examiner.

Respectfully submitted,

PETER C. DORSEY
United States Attorney
District of Connecticut
New Haven, Connecticut 06508

KENNETH R. DAVIS
Assistant United States Attorney

APPENDIX

Memorandum of Decision

(Filed October 17, 1975)

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

[CAPTION OMITTED]

Ruling on Cross-Motions

for Summary Judgment

This action was brought pursuant to § 205(g) of the Social Security Act, as amended, 42 U.S.C. § 405(g), requesting judicial review of a final decision of the Secretary of Health, Education and Welfare. The Appeals Council reversed the Administrative Law Judge's decision, which had allowed dependents' insurance benefits to the plaintiff and her children retroactive to March 31, 1959. The case comes before the Court on cross-motions for summary judgment pursuant to Rule 56, Fed. R. Civ. P. No remaining factual issues exist to be resolved and the case can now be decided as a matter of law. The legal issue presented is whether or not the record contains substantial evidence to support the Secretary's denial action of survivor's insurance benefits for any month prior to January, 1970; and whether or not any valid application was filed with the Social Security Administration prior to January, 1971. The Court finds that the Secretary's findings are supported by substantial evidence and his decision is therefore affirmed.

Facts

At the time of Clayton E. Wooley's death, he was married to the plaintiff, Nellie T. Goff. He died on March 31, 1959 from injuries suffered during the course

of his employment by the State of Connecticut and was covered at the time by Workmen's Compensations. At that time the couple had three living children, a stepchild, Jane (Woolley) Turgeon, born June 1, 1949, married during May 1969; James Woolley, born February 3, 1953, and Patricia Woolley, born October 19, 1955.

The plaintiff concedes that no written application for Social Security benefits was formally filed in writing in behalf of the children until January 28, 1971. The defendant awarded payments for one year retroactively back to January, 1970, to the two minor children, James and Patricia, both of whom were under 18 years of age.

The plaintiff thereafter married her present husband, Joseph P. Goff, in 1962. She complains that she and the children should have been qualified to receive benefits commencing on March 31, 1959. Immediately after the death of her husband on March 31, 1959, she applied under Connecticut State Law § 5-144, for Workmen's Compensation and received an award for herself and said children. For that purpose she was represented by retained counsel and consulted him on the question of whether or not she and the children were entitled to receive Social Security Benefits. The attorney stated in an attached affidavit, that he had telephoned the New Britain Social Security Office sometime during July, 1959, to inquire as to the family's eligibility and was informed by a Social Security employee, that since she and the children were already receiving benefits under the State Workmen's Compensation Act, they did not qualify for Social Security insurance benefits.

She now claims that since she was dissuaded from filing in 1959, through the alleged false advice given by

an employee of the agency to her attorney, the latter's oral inquiry should be considered tantamount to a written statement of intent to file an application for benefits, as required by § 404.613 of Regulation No. 4. In fact, the Administrative Law Judge here made his finding that the oral telephone inquiry made by the plaintiff's attorney, of which no record could be found, constituted a lawful statement of intent, within the meaning of the Social Security regulations and justified a finding that the claim of the mother and children was valid and effective on March 31, 1959.

Discussion of Law

Title 42 U.S.C. § 405(a) vests in the Secretary the right to make and promulgate procedural regulations to administer the Act.[1] Under these regulations, 20 C.F.R. § 404.601(d) provides:

> ". . . an individual has not 'filed an application' for purposes of sections 202, 216(i), or 223 of the Act . . . until an application on a form prescribed in § 404.602 has been filed in accordance with the regulations in this subpart."

---

[1] 42 U.S.C. § 405(a) provides:

"*Rules and regulations.* The Secretary shall have full power and authority to makes rules and regulations and to establish procedures, not inconsistent with the provisions of this title, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder."

20 C.F.R. § 404.601(e) provides:

> "The term 'to execute an application' (or a written statement, request, or notice . . .) means the completion and signing of the application (or written statement, request, or notice). . . ."

In furtherance of the foregoing policy, § 404.613 of these regulations provides, that if an individual files a written statement with the Social Security Administration, which indicates an intention to claim benefits and such statement bears his signature, the filing of such statement shall be considered to be the filing of an application for such benefits. Thus the administrative purpose of the Act and its supporting regulations were specifically designed to assure, that only a written expression of intent to claim Social Security benefits should be accepted and considered as a valid application under the law. This case is clearly distinguishable from the case of *Tuck* v. *Finch*, 430 F.2d 1075 (4th Cir. 1970), cited by the plaintiff, and the plaintiff concedes that no written record exists in the Social Security office to confirm that an application, written or oral, was ever filed.

The Social Security Act, supplemented by its regulations, was intended to eliminate or at least reduce to a minimum the possibility of fraud, confusion, and laxity in its administration. The vastness of the program makes it essential to adhere to the written application procedure, if there is to be an orderly and controllable system of management for approving claims and paying out insurance benefits.

The plaintiff claims that the defendant is estopped from denying relief, because the agency's own employee dissuaded her from filing a written application. Further-

more, she claims that since the Administrative Law Judge, its own agency employee, found in her favor, the Government has thereby waived any procedural non-compliance by her in failing to file the required written application.

The Government cannot be estopped in this manner from insisting upon the performance of statutory conditions precedent, by the unauthorized acts of a local Social Security office employee.

> "But even assuming that he did receive 'misinformation' on which . . . acted to her detriment, it is plain that estoppel will not lie against the Government under these circumstances. Parties dealing with the Government are charged with knowledge of and are bound by statutes and lawfully promulgated regulations despite reliance to their pecuniary detriment upon incorrect information received from Government agents or employees. Failure to comply with the applicable statute and regulations precludes recovery against the Government 'no matter with what good reason' the claimant believed she had come within the requirements. Estoppel will not lie regardless of the financial hardship 'resulting from innocent ignorance.' Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10; Walker-Hill Co. v. United States, 162 F.2d 259 (7 Cir. 1947), cert. den. 332 U.S. 771, 68 S.Ct. 85, 92 L.Ed. 356; James v. United States, 185 F.2d 115, 22 A.L.R. 2d 830 (4 Cir. 1950)." *Flamm* v. *Ribicoff*, 203 F. Supp. 507, 510 (S.D.N.Y. 1961).

Also see, *McIndoe* v. *United States*, 194 F.2d 602, 603 (9th Cir. 1952); and *Taylor* v. *Flemming*, 185 F. Supp. 280, 284 (W.D. Arkansas 1960).

While the Administrative Law Judge found that the telephone inquiry made by the plaintiff's attorney constituted a statement of intent on the part of the plaintiff to file for benefits within the meaning of § 404.613, that conclusion was in fact an interpretation of a rule of law applied to the factual circumstances as the judge found them. To press beyond and claim that his ruling, as an employee of the agency, constituted an actual waiver of the defendant's position, so as to estop it from denying benefits, would destroy the quasi-judicial character of the Administrative Law Judge. It would also unduly curb the Secretary's clear statutory right to an effective review of final rulings, pursuant to 42 U.S.C. § 405(b). This statute provides in part:

> "The Secretary is further authorized, *on his own motion*, to hold such hearings and conduct such investigations and other proceedings as he may deem necessary or proper for the administration of this title." (Emphasis added).

Such a construction would also unduly limit the right to a full judicial review under 42 U.S.C. § 405(g); a result never contemplated by the Congress.

The factual situation found to exist here does not conform to the essential requirements of the Social Security Regulations, 20 C.F.R. §§ 404.602 and 404.613. Failure of the plaintiff to file a timely application under the rules is not simply a non-essential procedural requirement, it is a substantial and basic requirement of the regulations.

> "In examining the regulations promulgated by the Secretary of Health, Education, and Welfare, the Court refers to pertinent provisions of 20 C.F.R. § 404.601 et seq. Under § 404.601, it is required that an individual file an application on

> a form prescribed by the Administration. Section 404.607(b) provides for benefits retroactive for one year from the date of filing. Section 404.608 sets out the guideline that a written statement, request, notice or application is deemed 'a filing,' but only on the date it is received by the local office. In addition, such a statement must be reduced to the prescribed form within certain periods for it to be effective." *Parker* v. *Finch*, 327 F. Supp. 193, 195 (N.D. Ga. 1971).

The defendant Secretary is charged with the duty to weigh the evidence, to resolve material complaints in the testimony and to determine the cases accordingly. *Moss* v. *Gardner*, 411 F.2d 1195 (4th Cir. 1969); *Staples* v. *Gardner*, 357 F.2d 922 (5th Cir. 1966); *Stumbo* v. *Gardner*, 367 F.2d 275 (6th Cir. 1966); *Rhinehart* v. *Finch*, 438 F.2d 920 (9th Cir. 1971). The findings of the Secretary are conclusive, if supported by substantial evidence and a proper application of the law.

The Court adopts the findings and decisions of the Appeals Council (Tr. 4-10) as affirmed by the Secretary of Health, Education, and Welfare. The Court finds that the Secretary's determinations were supported by substantial evidence, as required under § 205(g) of the Social Security Act, 42 U.S.C. § 405(g). *Newman* v. *Celebrezze*, 310 F.2d 780 (2d Cir. 1962); *Dondero* v. *Celebrezze*, 312 F.2d 677 (2d Cir. 1963).

The defendant's motion for summary judgment is granted. SO ORDERED.

Dated at Hartford, Connecticut, this 17th day of October, 1975.

/s/ T. EMMET CLARIE
T. EMMET CLARIE
Chief Judge

Social Security Administration Bureau of Hearings and Appeals

Decision of Appeals Council

(Filed July 22, 1974)

In the case of
Nellie T. Goff for self and o/b/o
Jane W. Turgeon, James and
Patricia Wooley
(Claimant)
Clayton Wooley
(Wage Earner)

Claim for
Mother's Insurance Benefits
Child's Insurance Benefits
048-20-6929
(Social Security Number)

This case is before the Appeals Council on its own motion to review the decision of the administrative law judge issued on March 11, 1974. The Appeals Council notified the claimant and her representative of this action and of her rights with respect thereto.

Mr. Jeremiah M. Keefe, Esquire, the claimant's representative, appeared before the Appeals Council on June 4, 1974 and presented oral argument on behalf of the claimant.

In his decision, the Administrative law judge found that an oral inquiry, concerning the payment of benefits to the claimant and her children, made in 1959, by her then representative, constituted a written statement of intent to file a claim for benefits as required by section 404.613 of Regulations No. 4 of the Social Security Administration and that the claimant and her children were entitled

to mother's and child's insurance benefits, respectively, beginning March 1959.

Evidence in addition to that considered by the administrative law judge has been entered into the record by the Appeals Council as follows:

Exhibit AC-1 Copy of affidavit signed by Bernard F. Grabowski, dated April 10, 1974.

ISSUES

The general issue before the Appeals Council is whether mother's and child's insurance benefits are payable to the claimant for any month prior to January 1970. Specifically at issue is whether an oral inquiry made in 1959 constituted a statement of intent to file an application for benefits as prescribed in section 404.613 of Regulations No. 4.

LAW AND REGULATIONS

Section 202(d) of the Social Security Act provides, in pertinent part, for the entitlement to child's insurance benefits of a child who, among other requirements, has filed an application for child's insurance benefits and who is not married.

Section 202(g) of the Act provides, as pertinent herein, for the entitlement to mother's insurance benefits of a widow of the wage earner who, among other requirements, has filed an application for mother's insurance benefits and who is not married.

Social Security Administration Bureau of Hearings and Appeals

Section 202(j)(1) of the Act provides that the retroactivity of an application for monthly benefits shall be limited to 12 months prior to the month of filing of the application.

Section 205(a) of the Act provides that:

> "The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this title, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder."

Section 404.601(b) of Social Security Administration Regulations No. 4 provides, in pertinent part, that the term "applicant" refers to the individual who has filed an application on his own behalf or on behalf of another for monthly benefits. Section 404.601(c) of the regulations indicates that the term "application" refers only to an application on a form prescribed in section 404.602 and includes an application for monthly benefits. Section 404.601(d) provides that an individual has not "filed an application" for purposes of section 202 of the Act until an application on a form prescribed in section 404.602 has been filed in accordance with the regulations in Subpart G. Section 404.601(e) of the regulations provides that the term "to execute an application" means the completion and signing of the application (or written statement, requests, or notice).

Social Security Administration Bureau of Hearings and Appeals

Section 404.608(a) of the regulations provides, in pertinent part, that an application (or written statement, request or notice) is considered to have been filed only as of the date it is received at an office of the Social Security Administration or by an employee of the Administration who has been authorized to receive such application at a place other than such office. Section 404.610 provides that any request for a determination or decision relating to a person's right to monthly benefits shall be in writing.

Section 404.613 of the regulations provides, in pertinent part, that where an individual filed a written statement with the Administration that indicates an intention to claim monthly benefits and said statement bears his signature, the filing of said written statement is considered to be the filing of an application for such purposes, provided a prescribed application is filed by such individual within 6 months of the date of notice of the requirement therefor.

EVIDENCE CONSIDERED

The Appeals Council has carefully studied all the testimony at the hearing, the arguments made, and the exhibits of record.

EVALUATION OF THE EVIDENCE

The claimant filed an application for child's insurance benefits on January 28, 1971. The wage earner died fully insured on March 31, 1959. Benefits were awarded effective January 1970 to James, born on February 3, 1953, and Patricia, born on September 19, 1955. The claimant, who was married to the wage earner at the

time of his death, remarried in 1962. The claimant requested reconsideration maintaining that benefits should be payable beginning March 1959 because the claimant had been dissuaded from filing in 1959 by her then representative. Upon reconsideration it was determined that no application had been filed prior to the one dated January 28, 1971 and that benefits could begin no earlier than January 1970.

The record reflects no oral or written inquiry ever having been made prior to the January 1971 application. The claimant's attorney at the time of the wage earner's death, Benjamin Grabowski, alleges that he telephoned the New Britain, Connecticut Social Security Office, and was informed that no benefits were payable because workmen's compensation benefits were being paid to the claimant and her children (Exhibits 20 and AC-1). This conversation allegedly took place in 1959, shortly after the wage earner's death.

As to whether a valid application exists based on the alleged oral inquiry, section 404.613 of Regulations No. 4 clearly requires a *written statement* indicating intent to claim benefits. Moreover, Social Security Ruling 66-17c, C.B. 1966, p. 39, clearly indicates that an oral inquiry is insufficient to constitute the filing of an application. In this Ruling, an individual inquired orally in February 1956 as to whether she qualified for widow's insurance benefits, and was advised of the deceased worker's lack of insured status and of her ineligibility. She subsequently filed a written application for benefits in May 1962, and submitted evidence which was sufficient to establish additional earnings for the worker, giving him an insured status as of his date of death. It was held

that the oral inquiry did not constitute the filing of an application since applications for benefits must be in writing and that the Social Security Administration cannot be estopped from asserting the requirements for entitlement to benefits.

In addition, the great weight of the court decisions support the Social Security Administration's policy, as reflected by the Ruling (*supra*), with regard to what constitutes an application. The requirement of the regulations that an application must be in writing and that an oral claim cannot constitute an application has been held to be a proper exercise of regulatory authority. *Smaltz* v. *Ribicoff*, CCF UIR, Fed. para. 14,632 (W.D. Mo., 9/27/62). Where there is no record of a written request for benefits, the claimant has not established a condition precedent for entitlement. *Graham* v. *Celebrezze*, CCH UIR, Fed. para. 16,146 (W.D. Mo., 12/18/63). The filing of a written statement of intention to claim benefits is a minimum requirement for entitlement to benefits. *Mandelstram* v. *Celebrezze*, CCH UIR, Fed. para. 14,733 (E.D.N.Y. 3/16/67). See also, *Emerson* v. *Celebrezze*, CCH UIR, Fed. para. 14,237 (M.D. Ga., 6/7/65); *Flamm* v. *Ribicoff*, 203 F. Supp. 507 (1961); *Hilton* v. *Celebrezze*, CCH UIR, Fed. para. 14,315 (S.D. W. Va., 1/11/66); *Stiel* v. *Celebrezze*, CCH UIR, Fed. para. 16,235 (E.D. Mo., 6/14/64); SSR 63-37c (C.B. 1963, p. 13). Also, it is well established that the government cannot be estopped by the actions of its agents from requiring compliance with statutory conditions of entitlement. See *Caldwell* v. *Celebrezze*, CCH UIR, Fed. para. 14,650 (1962) and *Taylor* v. *Flemming*, 186 F. Supp. 280 (1960).

The claimant's representative contends that the decision of the U.S. Court of Appeals for the Fourth Circuit in

the case of *Tuck* v. *Finch*, 430 F.2d 1975 (1970) is applicable to the case at hand. The question in that case was whether Mr. Tuck acquired 4 quarters of coverage in 1961 to meet the insured status requirements for disability purposes. By finding that Mr. Tuck filed an application for benefits in February 1965, when he had inquired orally at a social security office about benefits, the Court was then able to indicate that the Secretary could change his records *of Tuck's self-employment income in 1961 under section 205(c)(5)(A) of the Act* inasmuch as the February 1965 "application" tolled the statute of limitations until a "final" decision was made thereon. Thus, *Tuck* involved a question of the filing of an application for purposes of section 205(c)(5)(A) rather than for purposes of entitlement under sections 202(d) and 223(g) of the Act.

The relevant portion of the Circuit Court's decision is as follows:

> "The Secretary has prescribed application forms for disability insurance benefits. 20 CFR sections 422.501 and .505. Ordinarily an application made on this form will conclusively establish the date it was filed. Use of a form, however, does not appear to be mandatory, and its absence does not conclusively establish that no application was made, especially when the applicant is illiterate. Here the Secretary's own records affirmatively show that in February 1965, Tuck asked about receiving Social Security benefits and that an official of the Social Security Administration discussed his application with him. While a written application might be expected from a literate person, an illiterate often can do little other than make an oral request to the official to whom he has been referred.
>
> * * * * *

Social Security Administration Bureau of Hearings and Appeals

> We hold, therefore, that Tuck's oral request for benefits and the records of the Secretary establish that in February 1965 Tuck made an application for monthly benefits. Therefore, under section 205(c)(5)(A) of the Act, the Secretary may change his records so they will correctly reflect the number of quarters of coverage to which Tuck is entitled."

It is quite clear that a distinguishing factor in *Tuck* is that the Secretary's records corroborated his claim that he "applied" for disability benefits in February 1965, and that, as an illiterate, an oral inquiry would be the manner in which he would apply for benefits. In the instant case, there is no record of the alleged oral inquiry and neither the claimant nor Mr. Grabowski could be considered to be illiterate. It would, therefore, appear because of the dissimilarities in the two cases(*Tuck* and the one at hand), that the court's findings in the *Tuck* case are not applicable to the present proceeding. Moreover, the Social Security Administration has not acquiesced in the *Tuck* decision nor has it effected any policy changes based on that decision.

The administrative law judge was clearly in error in finding that the alleged oral inquiry made by Mr. Grabowski in 1959 was the equivalent of the written statement required by section 404.613 of Regulations No. 4. The only valid application for monthly benefits in this case was filed on January 28, 1971.

Social Security Administration Bureau of Hearings and Appeals

FINDINGS AND CONCLUSIONS OF THE APPEALS COUNCIL

In summary, the Appeals Council makes the following findings and conclusions:

1. The alleged oral inquiry made by Mr. Grabowski does not constitute a written statement of intent to file an application for benefits as required by section 404.613 of Regulations No. 4.

2. Pursuant to section 202(j)(1) of the Act, the application filed on January 28, 1971 can be retroactive only to January 1970.

3. The claimant, Nellie T. Goff, is not entitled to mother's insurance benefits, having remarried in 1962.

4. Jane W. Turgeon married in May 1969 and is, therefore, not entitled to child's inurance benefits based on the application filed on January 28, 1971.

5. James and Patricia Wooley are entitled to child's insurance benefits beginning January 1970 based on the application filed on January 28, 1971.

DECISION

The decision of the administrative law judge is reversed. It is the decision of the Appeals Council that Nellie T. Goff is not entitled to mother's insurance benefits; that Jane W. Turgeon is not entitled to child's insurance bene-

fits; and that James and Patricia Wooley are entitled to child's insurance benefits beginning January 1970 and for no prior month.

APPEALS COUNCIL

/s/ JOSEPH E. DONEGHY
JOSEPH E. DONEGHY, Member

/s/ NORMAN S. KERNS
NORMAN S. KERNS, Member

/s/ HERMAN ELEGANT
HERMAN ELEGANT, Member

Date: Jul. 22, 1974

Memorandum of Decision

(Filed July 1, 1974)

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

[CAPTION OMITTED]

Ruling on Defendant's Motion for Summary Judgment

The plaintiff brought this action pursuant to § 205(g) of the Social Security Act, as amended, 42 U.S.C. § 405 (g), against the Secretary of Health, Education and Welfare (Secretary) and the defendant filed a motion for summary judgment pursuant to Rule 56, Fed. R. Civ. P. In his action, the plaintiff requests a judicial review of the October 17, 1972 order of the Federal Appeals Council of the Social Security Administration and challenges the correctness of a final decision of the Secretary, denying his disability benefits for the period from October 1964 to July 6, 1970. The issue to be decided is whether or not the record contains substantial evidence to support the respondent's denial action, on the grounds that the plaintiff failed to formally apply for the benefits in October 1964, or at any time prior to the ultimate approval of his July 6, 1970 application.

Facts

The plaintiff, Edward Adolf Abel, a German born emigrant, has lived in the United States since December 1933. He speaks English poorly and has a limited comprehension of that language. He spoke only German at home and had little contact with people outside his own immediate family.

The evidence in the record supports the plaintiff's claim that he was a fully insured individual under the Social Security Act in October 1964, having met the special quarterly earnings requirements prescribed by law; and he has continued to be so qualified in that respect down to the present date. The parties filed a written stipulation dated May 15, 1974, to supplement the record wherein they agreed that the plaintiff-claimant had been totally disabled within the meaning of the Act since October 1, 1941, and that this disability existed in 1964 and continued unabated to the present time. (Plaintiff's Exhibit A).

It was in the early 1940's that the plaintiff suffered third degree burns in an industrial accident. A spark from a fellow-worker's torch ignited a quantity of gasoline and oil in the shop where he was employed as a mechanic. His lower extremities were badly burned, so as to cause a breakdown of tissue; and this resulted in multiple abscesses and ulcers to form on his feet and legs. At one point in his convalescence he had experienced 23 operations over a five-year period. Biopsies taken from a large ulcer on the right foot disclosed "squamous cell skin carcinoma." In addition to the extensive scarring and skin grafting on both lower extremities, there exists a moderate degree of "circulatory stasis" of both lower extremities. (Tr. 63-65).

When he was hospitalized in 1964, he learned from a fellow roommate, that he might be eligible to receive Social Security disability benefits. He resided in Brooklyn, New York in October 1964, so he went to the Bushwick Avenue Social Security Office, to inquire whether or not he might qualify to file an application for benefits under the Act. He recalled that the Government interviewer who questioned him was named Rodriguez or

bore a somewhat similar name and he described him as a Puerto Rican male, between 25-30 years of age. (Tr. 31).

The plaintiff testified that he gave this interviewer his Social Security number and was required to sign a green form, which he understood to be an application for disability benefits. (Tr. 22). On October 19, 1964, he wrote to Baltimore for a statement of the status of his Social Security account (Tr. 52), but claims he never directly received a copy of his earnings.

However, the form apparently was received at the local Social Security Office, but it did not declare the plaintiff's eligibility or lack of it. The stipulation (Plaintiff's Exhibit A) agreed that, "a record of eligibility is normally received directly by the local Social Security Office and not by the claimant; and when such a record is not part of a formal application, it is destroyed."

The examiner did disclose at the hearing a copy of a Social Security communication, which reported the claimant's entire earnings record through March 1964. (Tr. 24, 51). The plaintiff expressed his belief, that he had previously seen this green sheet of paper a long time ago. (Tr. 28). He described the Social Security office building, the location of the employee's desk in the interview room and the color of the latter's complexion. It was this same Government interviewer, who plaintiff claims told him, that he did not have enough earning quarters to qualify for disability benefits at that time. (Tr. 34-35).

The Secretary based his denial of the plaintiff's claim for these benefits on the latter's failure to conform to the statutory requirement that a formal application was a condition precedent to establishing eligibility. The plaintiff admitted in the application which he filed July

6, 1970, that neither he nor anyone in his behalf had ever filed an application for monthly Social Security benefits before. (Record Exhibit 1, at 44).

The Social Security Act provides in pertinent part:

> "No period of disability shall begin as to any individual unless such individual files an application for a disability determination with respect to such a period . . . ." § 216(i)(2)(B), 42 U.S.C. § 416(i)(2)(B).
>
> ". . . An individual who would have been entitled to disability insurance benefit for the month had he filed application therefore before the end of such month shall be entitled to such benefit for such month if such application is filed before the end of the 12th month immediately succeeding such month . . . ." § 223(b), 42 U.S.C. § 423(b).
>
> "The Secretary shall have full power and authority to make rules and regulations and to establish procedures, not inconsistent with the provisions of this title, which are necessary or appropriate to carry out such provisions, and shall adopt reasonable and proper rules and regulations to regulate and provide for the nature and extent of the proofs and evidence and the method of taking and furnishing the same in order to establish the right to benefits hereunder." § 205(a). 42 U.S.C. § 405(a).

The statutory procedure requiring the filing of an application as a condition precedent was designed to eliminate or at least minimize the possibilities of fraud, confusion and lax administration. The broad scope of the Act makes this essential to an orderly and carefully guarded system of management for the paying out of the law's benefits.

While the palintiff claims that the Government should be estopped from denying relief to him, because of the Social Security agent's alleged misleading representation, that he had not earned enough paid-in quarters to qualify, such is not the law.

> "But even assuming that he did receive 'misinformation' on which . . . acted to her detriment, it is plain that estoppel will not lie against the Government under these circumstances. *Parties dealing with the Government are charged with knowledge of and are bound by statutes and lawfully pormulgated regulations despite reliance to their pecuniary detriment upon incorrect information received from Government agents or employees.* Failure to comply with the applicable statute and regulations *precludes recovery against the Government* 'no matter what good reason' the claimant believed she had come within the requirements. Estoppel will not lie regardless of the financial hardship 'resulting from innocent ignorance.' Federal Crop Insurance Corp. v. Merrill, 332 U.S. 380, 68 S.Ct. 1, 92 L.Ed. 10; Walker-Hill Co. v. United States, 162 F.2d 259 (7 Cir. 1947), cert. den. 332 U.S. 771, 68 S.Ct. 85, 92 L.Ed. 356; James v. United States, 185 F.2d 115, 22 A.L.R. 2d 830 (4 Cir. 1950)." *Flamm* v. *Ribicoff*, 203 F. Supp. 507, 510 (S.D.N.Y. 1961).

Also see, McIndoe v. *United States*, 194 F.2d 602, 603 (9th Cir. 1952).

Nor does the factual situation come within the requirements of the Social Security Regulations authorized by law. Title 20 C.F.R. §§ 404.602 and 404.613 clearly prescribe the nature of the writing required to satisfy the statute. The plaintiff's action does not meet this

requirement. The failure to file an application under the rules is not simply a non-essential procedural requirement, it is a substantial and basic requirement of the regulations.

> "In examining the regulations promulgated by the Secretary of Health, Education, and Welfare, the Court refers to pertinent provisions in 20 C.F.R. § 404.601 et seq. Under § 404.601 it is required that an individual file an application on a form prescribed by the Administration. Section 404.607(b) provides for benefits retroactive for one year from the date of filing. Section 404.608 sets out the guideline that a written statement, request, notice or application is deemed 'a filing,' but only on the date it is received by the local office. In addition, such a statement must be reduced to the prescribed form within certain periods for it to be effective." *Parker* v. *Finch*, 327 F. Supp. 193, 195 (N.D. Ga. 1971).

The respondent Secretary is charged with the duty to weigh the evidence, to resolve material confiicts in the testimony and to determine the case accordingly. *Moss* v. *Gardner*, 411 F.2d 1195 (4th Cir. 1969); *Staples* v. *Gardner*, 357 F.2d 922 (5th Cir. 1966); *Stumbo* v. *Gardner*, 365 F.2d 275 (6th Cir. 1966); *Rhinehart* v. *Finch*, 438 F.2d 920 (9th Cir. 1971). The findings of the Secretary are conclusive, if supported by substantial evidence and must be upheld.

The Court adopts the findings and decision of the Hearings Examiner as affirmed by the Secretary of Health, Education, and Welfare. These determinations were supported by substantial evidence as required under § 205(g) of the Social Security Act, 42 U.S.C.A. § 405(g). *Newman* v. *Celebrezze*, 310 F.2d 780 (2d Cir. 1962); *Dondero* v. *Celebrezze*, 312 F.2d 677 (2d Cir. 1963).

Memorandum of Decision

The defendant's motion for summary judgment is granted. SO ORDERED.

Dated at Hartford, Connecticut, this 1st day of July, 1974.

/s/ T. EMMET CLARIE
Chief Judge

Notice of Appeal

UNITED STATES DISTRICT COURT

DISTRICT OF CONNECTICUT

[CAPTION OMITTED]

Notice is hereby given that Nellie T. Goff, plaintiff abovenamed, hereby appeals to the United States Court of Appeals for the Second Circuit from the final judgment entered in this section on the 28th day of November, 1975.

JEREMIAH M. KEEFE,
21 State Street, P.O. Box 2156
Waterbury, Connecticut 06702
Attorney for Nellie T. Goff.

★ U. S. Government Printing Office 1976— 614—352—303

United States Court of Appeals
FOR THE SECOND CIRCUIT

No. 76-6004

NEILLIE GOFF

Appellant

v.

CASPER WEINBERGER, Secretary of Health Education and Welfare, et al

Appellee

AFFIDAVIT OF SERVICE BY MAIL

Stephen Zedalis, being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 47-19 194th Street Flushing, New York

served the within Brief and Appendix for the Appellee

upon Jeremial M. Keefe & Robert C. Johnson, Esqs

21 State Street

Waterbury, Connecticut

Attorney(s) for the Appellant in the action, the address designated by said attorney(s) for the purpose by depositing a true copy of same enclosed in a postpaid properly addressed wrapper, in a post office official depository under the exclusive care and custody of the United States Post Office department within the State of New York.

Stephen Zedalis

Sworn to before me,

This 19th day of April 1976

Edward A Quimby

EDWARD A. QUIMBY
Notary Public, State of New York
No. 24-3183500
Qualified in Kings County
Commission Expires March 30, 1977